In the Supreme Court
of the United States

OCTOBER TERM, 1975

No. 75-1121

UNITED STATES LINES, INC.,

Petitioner,

v.

JOHN SHELLMAN,

Respondent.

BRIEF OF RESPONDENT SHELLMAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I N T H E S U P R E M E C O U R T

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Respondent Shellman prays that the Petition for Writ of Certiorari be denied.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

(1) The ruling of the Court of Appeals is in accord with virtually all reported cases and with the plain meaning of 33 USC § 905(b).

The Court of Appeals in this case rejected

> "both the Murray Credit and Shellman Doctrines because they are contrary to the weight of authority and because they impose unjustified burdens upon the injured longshoreman." (App. A21)

The Petition for Certiorari, however, claims (p. 6) that the lower court decisions on this subject thus far have reached "varying results." In fact, almost every reported decision since the enactment of § 905(b) in 1972 reaches the same result as the Court of Appeals for the Ninth Circuit in this and the companion Dodge v. Mitsui case. Lucas v.

"Brinknes" etc., 379 F.Supp. 759 (E.D.Pa., 1974); Landon v. Lief Heogh and Co., Inc., 521 F.2d 756 (C.A. 2, 1975), cert. den.; sub nom. A/S ARCADIA v. Gulf Insurance Co., ___ US ___, 44 US Law Week 3398 (1/12/76);[1] Hubbard v. Great Pacific Shipping Co., 404 F.Supp. 1242 (D. Or. 1975); Croshaw v. Koninklijke, etc., 398 F.Supp. 1224 (D. Or. 1975); Santino v. Liberian Distance Transports, Inc., 405 F.Supp. 34 (W.D. Wash., 1975).

The only "varying results" in reported decisions to date are those of the District Court in this case (1975 AMC ~~1130~~ 362), and a brief, verbal decision of Judge Blair in Frasca v. Prudential Grace Lines, 1975 AMC 1130, 1143 (D. Md., 1975), expressly following the now-overruled Shellman

[1] The Lucas and Landon cases are not cited among the cases "petitioner's counsel knows of" in footnote 1 of the Petition for Certiorari, p. 6.

District Court decision.

Thus, the lower court rulings are almost uniformly in accord with the decision of the Court of Appeals for the Ninth Circuit in this case that Congress in enacting the 1972 amendment to the Longshoremen's and Harbor Workers' Compensation Act, 33 USC §§ 905(b), did not intend to reduce an injured longshoreman's recovery of damages against a third party vessel because of concurrent negligence of fellow longshoremen. There is no evidence that Congress in §§ 905(b) meant to alter or overrule Pope & Talbot, Inc., v. Hawn, 346 US 406 (1953), in which this Court refused to permit such diminution of damages sustained by an innocent longshoreman.

Petitioner's claim that the decision below conflicts with those of other Courts of Appeals is most tenuous. The passage

in Murray v. U.S., 405 F.2d 1361 (C. A. D.C., 1968), relied on by Petitioner is ill-considered dictum, which fails even to mention the employer's rights to recover compensation payments out of any judgment obtained by the injured workman against a third party. As noted in subsequent cases in the District of Columbia Circuit, the Murray dictum ignores the undisturbed decision in Randall v. U.S., 282 F.2d 287 (C. A. D.C. 1960), cert. den. 365 U.S. 813, holding that a concurrently negligent employer may recover its compensation payments out of an employee's judgment against a concurrently negligent third party. See Dawson v. Contractors Transport Corp., 467 F.2d 727, fn. 3 (C. A. D.C., 1972), and Turner v. Excavation Construction, Inc., 324 F.Supp. 705 (D.C. D.C., 1971).

Petitioner's claim that the decisions of the Court of Appeals in this and in the Dodge case conflict with Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31 (C.A. 3, 1975), and U.S. v. Reliable Transfer Co., Inc., ___ US ___, 44 L.Ed.2d 251 (1975), is obviously wrong. Neither of those decisions decided any issue involved in the Shellman and Dodge cases.

(2) The "apparent internal inconsistency" question and argument concerning 33 USC § 905(b) made by Petitioner was not raised or argued below, and no such inconsistency exists.

Petitioner's statement of the Questions Presented and argument for granting the writ claim that there is an "apparent internal inconsistency" in 33 USC § 905(b) (Pet. pp. 2, 8-10.) Petitioner argued that if the phrase "caused by the negligence of

a vessel" means that a longshoreman can recover all his damages from a third party vessel owner whose negligence was only concurrent, then the same phrase in the second and third sentences of § 905(b) means that a longshoreman would be barred from any recovery against his employer as a vessel owner if negligence of fellow longshoremen was a concurrent cause of the injury.

No such argument was made to the Court of Appeals by Petitioner or amici curiae supporting Petitioner. It is not, therefore, surprising that the decision of the Court of Appeals did not engage in "textual analysis" (Pet. p. 8) of § 905(b) to rebut such an argument.

Moreover, the "apparent internal inconsistency" of the first sentence of § 905(b) with the second and third sentences is non-existent. It is plain from § 905 (b)

itself that Congress intended to preserve the right of an injured longshoreman to sue his employer as vessel owner for a negligently-caused injury, if the negligent employees were not his fellow longshoremen. Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31 (C.A. 3, 1975).

If Congress had simply phrased the second and third sentences of § 905(b) in the affirmative, as it did the first sentence, the lack of any inconsistency would be even plainer. Put affirmatively, the second sentence of § 905(b) would read:

> "If such person was employed by the vessel to provide stevedoring services, then an action shall be permitted if the injury was caused by negligence of persons not engaged in providing stevedoring services to the vessel."

No different meaning was intended by Congress stating the same thing negatively, as the second sentence of § 905(b)

actually reads:

> "If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel."

(3) The decision of the Court of Appeals was plainly right. The overruled decision of the District Court would permit a fault-free longshoreman to be denied recovery of part of his damages against a vessel owner because of negligence of fellow employees.

The District Court decision in this case, overruled by the Court of Appeals, expressly required an innocent longshoreman to suffer a reduction of his damage verdict against a third party vessel owner in proportion to the degree of concurrent negligence of fellow longshoremen employed by the same stevedore employer (1975 AMC at 369-370). At the subsequent trial of the Shellman case, the jury found Shellman

guilty of no contributory negligence, and that his injury was caused 30% by negligence of the vessel and 70% by negligence of his fellow longshoremen. Accordingly, the District Court entered a judgment reducing Shellman's damages by 70% from $15,485 to $4,645.

The District Court's opinion and decision are unclear as to whether the Court regarded Shellman as obligated to repay his employer out of his recovery the $7,475 in compensation and medical benefits he received under the Act. If Shellman was so obligated, his net recovery against the vessel of $4,645 (after the 70% reduction) was obviously less than his benefits under the Act. If he was not obligated to reimburse the employer's lien or payments made under the Act, Shellman's gross recovery on account of his injury was the $4,645 he

recovered from the vessel owner plus the $7,475 in benefits under the Act, for a total of $12,120. That sum is $3,365 (about 21.5%) less than the $15,485 in damages Shellman was entitled to recover from the vessel owner.

These results are plainly unconscionable. Injured longshoremen should not be denied recovery of the damages which they were entitled to recover against third party vessel owners before and after the 1972 amendments to the Act, by reason of what amounts to an application of the fellow servant rule, which has long been rejected in admiralty. Spinks v. Chevron Oil Co., 507 F.2d 216, 222 (C.A. 5, 1975).

The same point is made in 2 Larson, Workmen's Compensation Law (1975 Rev.) § 76.22, discussing a case in which an innocent longshoreman would have suffered diminution of $16,400 in his recovery

against the third party vessel owner due to the fault of fellow employees. Larson continues:

> "By what conceivable logic can he [the injured longshoreman] be told that he should absorb a loss of $16,400 for the benefit of the third party tortfeasor?
>
> "A rule capable of producing such a result is clearly unacceptable, particularly since its legal underpinnings are just as unsound as its practical result."

As the Court of Appeals correctly perceived in this case, the erroneous decision of the District Court imposed "unjustified burdens upon the injured longshoreman." (App. A21) If there is inequity in § 905(b) as to the present allocation of damages between a negligent vessel owner and a concurrently negligent stevedore, no greater

fairness results from shifting any such inequity from the vessel owner to the injured longshoreman.

Respectfully submitted,

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